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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1590. ~~1138~~ 6340. ~~3448~~

WASHINGTON M. JACOBS, APPELLANT,

vs.

J. M. GEORGE, J. J. HIERTZ, AND J. S. MORGAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED MARCH 14, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1590.

WASHINGTON M. JACOBS, APPELLANT,

vs.

J. M. GEORGE, J. J. HIERTZ, AND J. S. MORGAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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1 In the supreme court in and for the Territory of Arizona, at a term thereof begun and holden in Phœnix, in said Territory, on the 13th day of January, A. D. 1890.

Present: James H. Wright, chief justice; Joseph E. Kibbey, Richard E. Sloan, associate justices; J. E. Walker, clerk; W. K. Meade, marshal.

Be it remembered that heretofore, to wit, on the 28th day of February, A. D. 1889, there was filed in the office of the clerk of said court a certain transcript on appeal from the district court of the county of Pima, in said Territory, wherein Washington M. Jacobs, the plaintiff, was appellee and J. M. George, J. J. Hiertz, and J. S. Morgan and The San Ricardo Mining Company, defendants, were appellants; which said transcript, with the omission of the statement of facts, is in words and figures following, viz:

2 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

WASHINGTON M. JACOBS, Plaintiff,
vs.
J. M. GEORGE, J. J. HIERTZ, J. S. MORGAN, and THE SAN RICARDO MINING COMPANY.

The said plaintiff, by leave of the court first had and obtained, files herein the following amended complaint, and alleges—

I.

That heretofore and about the months of April, May, and June, 1883, and for a long time prior thereto the plaintiff was the equitable owner of an undivided one-fourth of the San Ricardo mining claim or location, situated in the Ures mining district, in the State of Sonora, Mexico, and the denouncement and other legal documents pertaining to the title to said mining claim were in the name of and in the possession of one Manuel Sanchez.

II.

That thereupon and prior to May 10th, 1883, plaintiff brought said mining claim to the attention of the defendants, Morgan, George, and Hiertz, and gave them an opportunity to examine and test the ores therefrom, and said defendants did so examine
3 and test said ores by assays made in plaintiff's assay office; that defendants were pleased with the result of said assays, and thereupon inquired of plaintiff what the said mining claim or property could be bought for, and being informed by the plaintiff that he thought it could be bought for the sum of $5,000.00 said defendants requested plaintiff to send for said Sanchez.

That thereafter and on the 10th day of May, 1883, said Sanchez came to Tucson at the request of the plaintiff, and plaintiff then in-

formed said Sanchez that said defendants had examined said ores, and that he had told them that he thought said mine could be bought for the sum of $5,000.00, and that he would introduce him to the said defendants and he could make his own trade; that thereafter, on said day, plaintiff brought said Sanchez and said defendants, George, Morgan, and Hiertz, together, and thereupon said George, Morgan, and Hiertz agreed with said Sanchez that they would purchase said mine for the price and sum of five thousand dollars upon certain terms of payment then and there agreed upon, provided said property should, upon examination thereof, prove satisfactory, and which said agreement was then and there reduced to writing and duly signed by said Sanchez and this plaintiff, as parties of the first part, and by said George, Morgan, and Hiertz, as parties of the second part.

III.

That thereafter, on the same day, to wit, May 10th, 1883, in consideration that plaintiff had called said mining claim to the attention of said George, Morgan, and Hiertz, and had furnished them ores from said mine, and had given them the use of his office and materials for assaying and testing said ores, and had brought said Sanchez to them, and that they had secured the contract aforesaid, the said defendants, George, Morgan, and Hiertz, entered into an agreement in writing with this plaintiff, of which the following is a copy, to wit:

"It is hereby agreed by and between J. M. George, J. J. Hiertz, and J. S. Morgan, parties of the first part, and W. M. Jacobs, party of the second part, as follows, to wit: The parties of the first part agree to proceed to Sonora and there examine the Saint Richards mine, and if found on examination to be satisfactory to pay for said property as provided for and specified in a certain contract of May 10th, 1883, made by the above-named parties and one Manuel Sanchez; and in case said property shall be purchased by the said J. M. George, J. J. Hiertz, and J. S. Morgan they and each of them mutually agree to deed to the said W. M. Jacobs, as commission for the sale of said mine, free from any and all expense to him, one-quarter of said mine, for him to have, hold, transfer at option, without cost or expense of taxes, assessment work, or other expense whatever.

The party of the second part agrees, *that* for and in consideration of said one-quarter of said mine, to give to the party of the first part the refusal and first option to purchase said one-quarter of said mine whenever the said party of the second part shall conclude to bargain for or sell his said quarter of said mine. It is also further agreed
4 by each of the parties herein named that the party of the first part shall have the right to erect and establish such reduction works upon or near said mine as they may deem fit, at their own expense, and develop said mine in such manner as in their judgment may seem to them best for the individual interest, without interference or hindrance by the party of the second part. It is further agreed that the party of the first part are to have and receive all the profits arising from the development of said mine and the reduction

of ores they may take from said property until the party of the second part shall have disposed of his said one-quarter of said mine.

Tucson, May 10th, 1883.

J. M. GEORGE.
J. J. HIERTZ.
J. S. MORGAN.
WASHINGTON M. JACOBS."

IV.

That thereafter and on or about the 24th day of November, 1883, the said George, Hiertz, and Morgan completed the purchase of said mining property from said Sanchez, and received from him a conveyance thereof, and became and were the owners thereof.

V.

That all and every of the said contracts and agreements hereinbefore mentioned were made in said county of Pima.

VI.

That heretofore and since their said purchase of said mining location plaintiff has frequently demanded from said George, Hiertz, and Morgan a deed of his fourth of said mining location, but they have each and all refused and do still refuse so to deed to this plaintiff.

VII.

That the defendant, the said San Ricardo Mining Company, is a corporation organized and existing under the laws of the Territory of Arizona, having its principal place of business at Tucson, in said county of Pima, and that it was organized and promoted by the other three defendants for the purpose of receiving a conveyance of said mining location, and plaintiff is informed and believes and so charges that said individual defendants have made a pretended conveyance of said mining location and of the whole thereof to said corporation, and that said corporation now claims to hold the title thereto, but plaintiff says that corporation took said title, if at all, with full knowledge of the title of this plaintiff to one-fourth thereof, as above set forth.

VIII.

That said mining location is in a foreign country and beyond the jurisdiction of this court, and it is not possible for plaintiff to place on record in the said Ures mining district any notice which shall warn innocent purchasers of the claim of plaintiff, and it is in the power of defendants, without the interference of this court, to alienate all of said mining location for the purpose of preventing any recovery by this plaintiff. Wherefore plaintiff prays judgment of this honorable court as follows:

I. That plaintiff is entitled to have and receive from the defendants, J. M. George, J. J. Hiertz, and J. S. Morgan, a deed of one-

fourth of said San Ricardo or Saint Richards mining location in accordance with the usual forms of such conveyances in the State of Sonora, Mexico.

II. That the said defendants be required to execute such a conveyance to plaintiff, or that upon their failure to make such deed the clerk of this court be authorized and directed to execute said deed in the names of said defendants.

III. That if it shall be found that the said San Ricardo Mining Company holds the legal title to more than three-fourths of said mining location its title to the excess of three-fourths thereof may be declared to be void as against the right of this plaintiff to have one-fourth thereof.

IV. That pending this action and the hearing and determination thereof the defendants and each of them and the officers, agents, and servants of said corporation may be restrained from alienating more than three-fourths of said mining location to any person or persons whatever.

V. That the defendants pay the costs and disbursements of plaintiff herein.

HAYNES & MITCHELL,
Attorneys for Plaintiff.

Indorsed: Filed November 12th at 9 o'clock a. m., A. D. 1887. J. H. Martin, clerk.

6 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

WASHINGTON M. JACOBS, Plaintiff,
vs.
J. M. GEORGE, J. J. HIERTZ, J. S. MORGAN, and THE SAN RICARDO MINING COMPANY, a Corporation.

Come now J. M. George, J. J. Hiertz, and J. S. Morgan, the personal defendants in the above-entitled action, and make answer to the complaint herein, and, answering thereto, these defendants deny:

I.

That plaintiff is now or that plaintiff ever was equitably or otherwise the owner of an undivided one-fourth of the Santa Crista or San Ricardo mining location or claim, situated in the Ures mining district, in the State of Sonora, Mexico, or any part thereof, or any interest therein whatever.

II.

These defendants aver that in the months of April, May, and June, 1883, one Manuel Sanchez and Refugio Fernandez were and had been prior thereto the owners in fee of the whole of said mining claim, and up to the 24th day of November, 1883, continued to be and ever since have been and now are the holders of the legal title to the whole of said mining claim and every part thereof.

III.

These defendants aver that they have been informed and believe and upon such information and belief deny that at the time alleged in said complaint or at any time plaintiff had lawful or any authority from the said Sanchez or from said Sanchez and Fernandez or either of them to sell said mining claim for the sum of three thousand dollars or for any sum less than $5,000 for the whole thereof.

IV.

Further answering and for another and further defense to said complaint, these defendants aver that they have been informed and believe and upon such information and belief aver that at all of the times alleged in said complaint Manuel Sanchez and Refugio Fernandez were the owners of the whole of the mining claim referred to in said complaint, and that plaintiff was the agent of the said Sanchez and Fernandez for the sale of the whole thereof for the sum of $5,000, and that it was agreed by and between the said plaintiff and the said Sanchez and Fernandez that upon the sale of said claim by said plaintiff as such agent for the said sum of $5,000 that he, the said plaintiff, should receive for his full compen-
7 sation and commission for his said services in the premises the sum of $1,250.00.

V.

These defendants aver that at all of the times named in said complaint the plaintiff, with the intent to deceive and defraud these defendants and each of them, falsely and fraudulently concealed from them, these defendants, the fact that he was the agent of or that he was to receive a commission from the said Sanchez and said Fernandez upon the sale of the mining property referred to in said complaint, and falsely and fraudulently and with intent to deceive these defendants and each of them stated to these defendants and each of them and so pretended that he was acting wholly in their interests and for their benefit in making said sale and not otherwise; and these defendants then and there believed said statement and pretense to be true, and then and there believed that said plaintiff was acting solely as the agent of and in the exclusive interest of these defendants and not as the commission agent of the said Sanchez and said Fernandez; and these defendants, so believing as aforesaid, were then and there, on the 10th day of May, 1883, by means of the aforesaid false and fraudulent representations, statements, and pretenses of plaintiff, and not otherwise, induced by plaintiff to and did sign the memorandum of agreement set forth in said complaint, but these defendants aver that the same is and was by reason of the plaintiff's said deceit, fraudulent acts and statements, wholly void and without any legal or valid consideration whatever.

VI.

And for another and further defense these defendants aver that it is provided by the laws of said Republic of Mexico that a contract is

void for error "if the error arises from the fraud and bad faith of one of the contracting parties;" and these defendants aver that said contract set forth in said complaint is wholly illegal and void under the said laws of said republic by reason of and on account of said fraud and fraudulent acts, statements, and conduct of plaintiff hereinbefore set forth.

VII.

Further answering, and for another and further defense to said complaint, these defendants aver that said mine and mining claim described in said complaint is situated in the State of Sonora and Republic of Mexico; that said one-fourth interest therein claimed by plaintiff and demanded by him in his said complaint is of the value of more than one thousand dollars; and these defendants aver further that the laws of said republic concerning contracts of purchase and sale of immovable property provides, among other things, that "the sale of an immovable, when its value does not exceed $500.00, may be made by a private instrument, which must be signed by the vendor and vendee before two known witnesses * * * of said instrument; two shall be executed—two originals—one for the vendor and one for the vendee, placing on the paper the 'corresponding seal.'" And it is also further provided and required by the laws of said republic that "If the value of the immovable exceeds
8 $500.00 the sale shall be executed in a public writing;" and it is further provided and required by said laws of said republic that a contract made and executed in foreign lands must be executed in conformity with the formalities required by the laws of such foreign lands, and in addition thereto "the contract must not be prohibited in substance nor lack the formalities required by the laws of the republic;" and these defendants aver that said contract referred to and set forth in said complaint is not nor was not made nor executed nor delivered in the manner and form prescribed and required by said law or any laws of said Republic of Mexico; and these defendants aver that said contract or agreement is wholly void under the laws of said Republic of Mexico.

VIII.

Further answering and for another and further defense, these defendants deny that they or either of them, on the 24th day of November, 1883, or at any time either before or since said day, received or obtained from said Manuel Sanchez or from any other person any deed or deeds of conveyance for the mining claim referred to in said complaint or for any part thereof, or that these defendants or either of them now have or ever had or held any deed or deeds of conveyance or any conveyance to or for said mining claim or any part thereof, or that the said Sanchez or any other person ever made or executed or delivered to these defendants or to any other person for these defendants or any of them deed or deeds of conveyance whatever for said mining claim or any part thereof, or that these defendants or any of them have or has or ever had or held the legal title to said mining claim or to any part thereof.

Wherefore these defendants pray the judgment and decree of this court:

1. That said plaintiff has not now and never had any title, either legal or equitable, to said mining claim described in said complaint or to any part thereof or to any interest therein.

2. That said contract or agreement set forth in said complaint was and is without consideration and void and of no force or effect whatever.

3. For such other and further relief as may be equitable and just.

4. And for costs of suit.

HEREFORD & LOVELL,
Attorneys for Defendants, J. M. George, J. J. Hiertz, and J. S. Morgan.

Service of copy admitted this 11th day of August, 1884.
HAYNES & STILES,
Attorneys for Plaintiff.

9 TERRITORY OF ARIZONA, } ss:
County of Pima, }

J. M. George, being first duly sworn, says that he is one of the defendants named in the foregoing answer; that he has heard read the same and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated upon his information and belief, and that as to such matters he believes it to be true.

J. M. GEORGE.

Subscribed and sworn to before me this 11th day of August, 1884.
[SEAL.] B. H. HEREFORD,
Notary Public.

Indorsed: Filed this 11th day of August, 1884. C. S. Jeffords, clerk; J. A. Anderson Jr., deputy.

10 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

WASHINGTON M. JACOBS, Plaintiff,
vs.
J. M. GEORGE *et al.*, Defendants.

Now come J. M. George, J. J. Hiertz, and J. S. Morgan, defendants in the above-entitled action, and by leave of court first had and obtained file this their amended answer and, answering plaintiff's complaint herein—

I.

Deny that plaintiff is or ever was equitably or at all the owner of an undivided one-fourth or of any part or interest whatever of, in, or to the Santa Christa or San Ricardo mining location or claim mentioned in plaintiff's complaint, and deny, on information and belief, that the said plaintiff had authority to sell the said mine for any sum less than five thousand dollars.

II.

Deny that there was any condition upon which any of the defendants would convey to the plaintiff as a commission upon the purchase of said mine by them from Sanchez or otherwise or at all any portion or undivided interest of, in, or to said mining claim, as stated in paragraph "V" of this answer, which is made a part hereof.

III.

Deny that upon or about the 10th day of May, 1883, or at all the said defendants reduced the pretended agreement set forth in the said complaint or any agreement to writing in the terms therein set forth or otherwise or at all, except as stated in paragraph "V" aforesaid, and deny that the agreement set forth in said complaint was ever executed or delivered by or between the plaintiff and the defendants or any of them, and aver that the memorandum set forth in said complaint was never delivered to plaintiff or intended to go into effect, and that it never did go into effect, but that the plaintiff, after the date thereof, refused to recognize the same.

IV.

Deny that defendants or any of them executed a pretended conveyance to the San Ricardo Mining Company, or that they executed any conveyance of any greater interest therein than an undivided three-fourths thereof.

V.

And for a further and separate defense these defendants
11 aver, upon information and belief, that during all the times mentioned in said complaint plaintiff was in the employment of said Sanchez as his agent to sell said mine upon a commission of one-fourth of the proceeds for which the same might be sold under an agreement with said Sanchez to obtain for him the highest possible price for said property; that in violation of such employment and the trust and duty reposed in plaintiff by said Sanchez plaintiff fraudulently attempted to reserve to his own use and benefit an undivided one-fourth interest in said mine, and, while pretending to the said Sanchez that the sum of $5,000 was the consideration and equivalent to the whole thereof, negotiated and effected a sale with these defendants upon the basis of a valuation of $5,000 for an undivided three-quarters thereof, demanding of and from these defendants by way of a commission for his pretended services as their agent an undivided interest of one-quarter of said mine, subject to the conditions contained in the pretended instrument set forth in said complaint.

That the agreement between said Sanchez and these defendants mentioned in said complaint was executed and delivered, and immediately thereafter plaintiff demanded from defendants the execution of an agreement for the conveyance by them to him upon said conditions of the said undivided one-quarter, a commission as aforesaid;

that preparatory to the execution thereof a preliminary draft thereof was made for the guidance of the attorney in drawing such agreement; that such draft is the memorandum set forth in said complaint, but for the reason that the same was not to go into effect, but only for the purpose aforesaid, defendants did not deliver same to the plaintiff; that hereafter defendants did tender to plaintiff a copy of same properly engrossed for execution, but plaintiff refused to execute the same and denied that the same expressed the agreement of the parties thereto, and the same never was executed; that thereafter said Sanchez, being informed for the first time, as defendants are informed and believe, of the said fraudulent acts of plaintiff, immediately notified these defendants that said acts of plaintiff were a fraud upon his rights, and that he claimed said undivided one-fourth interest as his property; that thereupon these defendants paid unto said Sanchez an additional sum of money, and in consideration thereof said Sanchez conveyed unto them the remaining undivided one-quarter interest in said mines which said Sanchez then held in equity by reason of the fraudulant acts of said plaintiff, and thereupon the defendants became vested with the equitable and legal title and the full ownership of said mines, and that plaintiff has no interest, legal or equitable.

VI.

And for a further and separate defense defendants aver—

That said San Ricardo mining claim is situated in the district of Ures, in the State of Sonora, Republic of Mexico, and, upon information and belief, *of* the laws of said State provide "that a private instrument or contract, including those relating to the sales or conveyance of real property and all interest therein, in trust or otherwise, has no force or effect against the person who has subscribed
12 it when he has it in his possession;" that the instrument set forth in said complaint and upon which plaintiff seeks to recover always has been and yet is in the possession of the individual defendants who subscribed it.

VII.

And for a further and separate defense defendants aver that said San Ricardo mining claim is situated in the district of Ures, State of Sonora, Republic of Mexico, and, upon information and belief, that the laws of said State of Sonora provide "that a contract is void by error if the error arise from the fraud or bad faith of the contracting parties;" that defendants adopt and make a part of this separate defense and aver all of the facts stated in paragraph "V" of this answer; that by reason of such facts the said contract is void by error.

VIII.

And for a further and separate defense defendants aver that said Ricardo mining claim is situated in the district of Ures, State of Sonora, Republic of Mexico; upon information and belief, that the laws of said State provide "that when the execution of any instru-

ment is denied the same shall be deemed void unless it be proved by the testimony of two subscribing witnesses thereto."

That there are no subscribing witnesses to the instrument in plaintiff's complaint and upon which plaintiff seeks to recover; that the execution of said instrument is denied.

IX.

And for another and separate defense defendants aver that said San Ricardo mining claim is situated in the district of Ures, State of Sonora, Republic of Mexico; upon information and belief, that the laws of said State provide "that where a contract relates to the purchase and sale of immovable property, if the value of such immovable property exceeds $500, the sale shall be executed in a public writing; that a contract made and executed in foreign lands must not only comply with the formalities required by the laws of such foreign lands, but also the contract must not lack the formalities required by the laws of the Republic of Mexico;" that among the formalities required by the said laws of the Republic of Mexico is that public writings must be acknowledged before a notary public or other officer thereunto duly empowered; that the execution of the contract set forth in plaintiff's complaint has not been proved or acknowledged before any officer, and that the same is not executed in a public writing.

Wherefore these defendants pray for a judgment and decree of this court:

1. That said plaintiff have no equitable relief.
2. That said contract is void.
3. That as to said plaintiff these defendants are the owners, 13 legal and equitable, of said mining claim.
4. The defendants have and recover their costs of suit and the percentage allowed by law, and for such other and further relief as may be just and equitable.

CAMERON H. KING,
Attorney for said Defendant-.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

J. J. Hiertz, being first duly sworn, says that he is one of the defendants named in the foregoing answer; that he has heard read the same and knows the contents thereof, and that the same is true of his knowledge except as to matters therein stated upon his information and belief, and as to such matters he believes it to be true.

J. J. HIERTZ.

Subscribed and sworn to before me this 21st day of April, 1885.

THOS. D. SATTERWHITE,
Notary Public.

Endorsed: Filed April 22d, 1885. C. S. Jeffords, clerk; J. A. Anderson, Jr., deputy.

Endorsed: Service of within amended answer admitted this April 22d, 1885. Haynes & Stiles, plaintiff's attorneys.

14 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

WASHINGTON M. JACOBS, Plaintiff,
vs.
J. M. GEORGE *et al.*, Defendants.

Now comes the San Ricardo Mining Company, one of the defendants in said action, and, answering plaintiff's complaint—

I.

Denies that plaintiff is or ever was equitably or at all the owner of an undivided one-fourth or of any part or interest whatsoever of, in, or to the Santa Christa or San Ricardo mining location or claim mentioned in said complaint, and denies that said plaintiff had authority to sell the said mine for any sum less than $5,000.

II.

Denies that there was any condition upon which any of the defendants would convey to plaintiff as a commission upon the purchase of said mine by them or any of them from Sanchez or otherwise or at all any part, portion, or undivided interest of, in, or to said mining claim.

III.

Denies that upon or about the 10th day of May, 1883, or at all, the said defendant reduced the pretended agreement set forth in said complaint or any agreement to writing in the terms therein set forth or otherwise or at all, and avers that the memorandum set forth in said complaint was never delivered to plaintiff nor intended to nor ever did go into effect.

IV.

Denies that the individual defendants executed a pretended conveyance of any of said property to this defendant, or that they executed any conveyance of any greater — than an undivided three-fourths interest therein.

V.

That said proposed agreement set forth in said memorandum was a fraud upon said Sanchez and said individual defendant, and was void, in this:

That said Sanchez employed said plaintiff in a fiduciary capacity, to wit, as his agent to sell said mine upon a commission of one-fourth (¼) of the proceeds for which the same might be sold.

15 That by the terms of his said employment it was plaintiff's trust and duty to obtain for Sanchez the highest possible price for said property and to act solely as the agent and in the interest of said Sanchez, and not to accept any profit or reward from any other person.

That in violation of his said trust and duty said plaintiff concealed from these individual defendants his true relations to said Sanchez,

and attempted to sell to them only a three (¾) fourths interest in said mine for five thousand ($5,000) dollars and reserve to himself the undivided one-fourth, and falsely and fraudulently represented to his principal, said Sanchez, that he was selling the whole of said mine for the sum of $5,000, and so concealed from him the facts of such proposed transfer that said Sanchez, in ignorance of said fraudulent acts, assented to a sale for five thousand dollars ($5,000) and did pay to plaintiff his commission as such agent as agreed, to wit, (¼) one-fourth of said five thousand ($5,000) dollars purchase-money.

That said Sanchez, thereafter having notice of said proposed agreement to reserve one-fourth (¼) of said mine for the use and benefit of plaintiff, protested to defendants against said transaction as a fraud upon him, and thereupon claimed to be the equitable owner of any interest, if any there was, reserved to plaintiff upon said sale.

That afterwards, for value, said Sanchez executed to the individual defendants his deed releasing and conveying to them any and all equitable interest remaining in him.

That said defendants, upon notice from Sanchez of said facts, refused to complete the execution of said agreement with plaintiff or to recognize any rights in him thereunto.

VI.

And for a further and separate defense defendant avers—

That said San Ricardo mining claim is situated in the district of Ures, in the State of Sonora, Republic of Mexico; that the laws of said State of Sonora provided as follows, viz: That a private instrument or contract, including those relating to the sale and conveyance of real property and all interests therein in trust or otherwise, has no force or effect against the person who has subscribed it when he has it in his possession; that the instrument set forth in said complaint and upon which plaintiff seeks to recover always has been and yet is in the possession of the individual defendants who subscribed it.

VII.

And for a further and separate defense defendant avers—

That said San Ricardo mining claim is situated in the district of Ures, in the State of Sonora, Republic of Mexico; that the laws of the State of Sonora provide as follows, viz: "That a contract is void for error if the error arise from the fraud or bad faith of one of the contracting parties;" that the contract set forth in said
16 complaint and upon which plaintiff seeks to recover is void by reason of the fraud and bad faith of said plaintiff in this, that at the dates therein mentioned plaintiff was and for some time prior thereto had been the agent of Manuel Sanchez therein mentioned, and it was his duty and trust under the terms of such agency to sell said property for the highest obtainable price as such agent.

That it was agreed between said Sanchez and said plaintiff that in consideration of any sale negotiated by said plaintiff he should not receive any compensation from the purchasers, but should ac-

count to said Sanchez for the whole of said purchase-money and receive from said Sanchez an amount equal to one-fourth (¼) of the purchase-money as and for full compensation.

That every representation of fact in said contract contained relating to the conveyance of any interest in said property as commission for the sale and purchase of said mine is erroneous and untrue by reason of the fraud and bad faith of plaintiff in concealing from said individual defendants that he was excluded by reason — his trust and employment at the hands of Sanchez from receiving any profit or emolument whatever out of said transaction from any person other than said Sanchez, and in concealing from said Sanchez that the price agreed to be paid by said individual defendants for said property was fixed and controlled and proportionately diminished by the proposed contract aforesaid to deed the said one (¼) fourth of said mine to plaintiff as a commission for his fraudulently pretended services rendered to them in the purchase thereof.

VIII.

And for a further and separate defense defendant avers—

That the San Ricardo mining claim is situated in the district of Ures, in the State of Sonora, Republic of Mexico; that the laws of the said State of Sonora provide as follows: "That where the execution of any instrument is denied that the same shall be deemed void unless it be proved by the testimony of two subscribing witnesses thereto."

That there are no subscribing witnesses to the instrument set forth in plaintiff's complaint and upon which plaintiff seeks to recover.

Wherefore defendant prays for a judgment and decree of this honorable court—

1st. That plaintiff take nothing by this action.

2d. That plaintiff has no right, title, or interest whatever, legal or equitable, of, in, or to the property described in said complaint, and that as against plaintiff these defendants herein are the owners of all thereof free of any claim or interest thereto or therein of any kind or nature on the part of said plaintiff.

3d. For such other and further relief as may seem meet and
17 proper.

4th. For the percentage allowed by law and costs of suit.

HOOVER & SATTERWHITE,
Attorneys for Defendant, San Ricardo Mining Company.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

R. M. Wilkin, being first duly sworn, says that he is the secretary *pro tem.* of the San Ricardo Mining Company, one of the defendants named in the foregoing answer; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated upon his information and belief, and that as to such matters he believes it to be true.

R. M. WILKIN.

Subscribed and sworn to before me this 21st day of July, 1884.

THOS. D. SATTERWHITE,

[SEAL] *Notary Public, Pima County, A. T.*

Endorsed: Service of a copy of the within answer admitted this 30th day of July, 1884. Haynes & Stiles, attorneys for plaintiffs. Filed this 30th day of July, 1884. C. S. Jeffords, clerk, by J. A. Anderson, Jr., deputy.

18 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

WASHINGTON M. JACOBS, Plaintiff,
vs.
J. M. GEORGE, J. J. HIERTZ, J. S. MORGAN, and THE SAN RICARDO MINING COMPANY, a Corporation, Defendants.

Statement of the Case and Facts.

Be it remembered that this cause came on for trial at a session of the regular September term, A. D. 1887, of said court, to wit, on the 22nd day of Sept., 1887. A trial by jury having been expressly waived by the respective parties, by their counsel, the same was tried by the court without a jury.

That on the 12th day of Nov., 1887, the court rendered its judgment in favor of plaintiff and against defendants, and decreed that defendants execute their deed to plaintiff for an undivided one-sixteenth interest to that certain mining property situated in the district of Ures, State of Sonora, Republic of Mexico, and known as the San Ricardo mine.

That on the 22nd day of Nov., 1887, defendants moved the court for a new trial of said cause.

That on the last-named day the court overruled and denied said defendants' said motion for a new trial, to which ruling and denial defendants excepted and gave their notice of appeal in open court, which was duly docketed and entered of record.

The following testimony and documentary evidence was introduced and proceedings had:

19 The transcript of the short-hand notes of the evidence is omitted and the findings of the supreme court substituted therefor.

The following are the exhibits mentioned in the pleadings and introduced in evidence, viz:

DEFENDANTS' EXHIBIT "A."

I will go and examine the mines in Sonora and at our expense, and if the mines suit us will take a bond for six months on the property at $5,000, we to have all the ore we wish to take out of the mine and have the privilege to do such work on the mine as we think proper, and either work same by Arastras or otherwise during

the time pending our bond, or, if after examination of mines we conclude to purchase, we will pay the owners $1,000 cash after examination, if found satisfactory, and $1,000 in sixty days and $1,000 in ninety days; balance, $2,000, at expiration of bond.

At the failure or non-compliance to the above will forfeit right to claim and what is paid.

J. S. MORGAN.

Tucson, May 8th, 1883.

I agree to use my best endeavors to secure the property above described upon the terms specified.

W. M. JACOBS.

DEFENDANTS' EXHIBIT "B."

(Translation.)

In the city of Tucson, county of Pima, Territory of Arizona, United States of America, on the 24th day of November, 1883, before me, Santiago Ainsa, a notary public, appeared Mr. Manuel Sanchez for himself and as attorney-in-fact of Mr. Refugio Fernandez, by duly authorized power, and said: Having made a contract with Mr. Washington M. Jacobs, of Tucson, in this Territory, to sell the mine San Ricardo, situated in the district of Ures, in the State of Sonora, Mexico, and that as a compensation for finding a buyer we would give him one-fourth part of the proceeds of the sale, and Mr. Jacobs having given us notice that he had secured a purchaser, to wit, Messrs. J. M. George, J. J. Hiertz, and J. S. Morgan, residents of Tucson, for the sum of five thousand dollars, payable at various times, the last to be made on November 24th, 1883, the said purchasers having duly paid the whole of the five thousand dollars, as provided for in the contract, the said San Ricardo mine being thus sold in my own name and that of Mr. Fernandez, I delivered to said Mr. Jacobs one-fourth of the money received, obtaining from him a receipt for the same that reads as follows, to wit:

TUCSON, *November 24th*, 1883.

I received from Manuel Sanchez the sum of one thousand two hundred and fifty dollars as part of the commission of the five thousand dollars which he received of Mr. J. M. George, J. J. Heirtz, and J. S. Morgan for the sale on the contract of the mine San Ricardo, situated in the district of Ures, in Sonora, Mexico.

(Signed) WASHINGTON M. JACOBS.

Witness:
SANTIAGO AINSA.

Mr. Jacobs, instead of being faithful to me for the management of the sale of said San Ricardo mine and obtain the highest value possible, as my agent should have done, untrue to his duty as my trustee, it is reported that he entered into a private contract with the purchasers that upon their buying said mine they should

transfer to said Jacobs, as a commission for procuring the purchase to them of the said mine, one undivided fourth interest in the said San Ricardo mine upon certain conditions, which I do not know what they may be, as I never was advised or had any knowledge of that pretended and clandestine contract.

After I had received the first payment on the sale of said mine I heard rumors of what Jacobs had done, and immediately I claimed from him that he had played false to his trust, and that he should give me such share of the part he had reserved for himself as by the terms of the contract for obtaining a purchaser should belong to me, but Jacobs refused to do me justice, although I am of the opinion that if said Jacobs has any interest in said San Ricardo mine that I and Mr. Fernandez are entitled to a share therein, the same which I now claim.

Wherefore by these presents we grant and transfer all our interest and title which by any title we may have or be entitled to have hereafter in the claim or in the right which said Jacobs may have from the purchasers in said mine San Ricardo for the sum of twelve hundred and fifty dollars, American money, to Messrs. J. M. George, J. J. Heirtz, and J. S. Morgan, payable as follows:

Two hundred and fifty dollars January 1st, 1884, and one thousand dollars on April 30th, 1884, in the city of Ures, in Sonora, Mexico.

And the Messrs. J. M. George, J. J. Hiertz, and J. S. Morgan, although they deny in toto the claims of Washington M. Jacobs, but only to prevent litigation and trouble, they will pay the said sum to stop expenses and lawsuits in the future, and so they signed it and sealed it.

MANUEL SANCHEZ.
P. P. REFUGIO FERNANDEZ.

Witnesses:
SANTIAGO AINSA.
JOSE MA. TERAN.

DEFENDANTS' EXHIBIT "C."

(Title of court and cause.)

This exhibit is the return of a commission issued to Sonora, Mexico, on the part of the defendants to take the deposition of Manuel Sanchez to the effect that said Sanchez was not home, could not be found, and his deposition could not, therefore, be had.

DEFENDANTS' EXHIBIT "1."

To J. M. George, J. S. Morgan, and J. J. Heirtz.

GENTLEMEN: In accordance with your agreement with me, made about July 1st, 1883, whereby you undertook to convey to me an undivided one-fourth interest in the San Ricardo mine, Ures district, Sonora, Mexico, about four miles from Mericiche, in consideration of my services in procuring you a contract for the purchase of

said mine from the owners thereof, I now demand from you the conveyance mentioned, and am,

Respectfully, WASHINGTON M. JACOBS.

Dated Tucson, Arizona, November 23d, 1883.

(Copy.)

DEFENDANTS' EXHIBIT "2."

TUCSON, *November* 24, *de* 1883.

Recibi de Menuel Sanchez la suma de mil docientos cincuenta pesos, come parte de comicion de los cinco mil pesos que recibio de los Sos J. M. George, J. J. Heirtz, y J. S. Morgan en la venta del contrato de la mina San Ricardo, situada en el distrito de Ures, en Sonora, Mexico.

(Firmado) WASHINGTON M. JACOBS.

Testigo:
SANTIAGO AINSA.

TERRITORY OF ARIZONA, } *ss:*
County of Pima, }

I hereby certify that I have compared the above with the original, and I find it to be an exact copy of said original in every particular.

In witness whereof I have hereunto set my hand and seal this 24th day of November, A. D. 1883.

SANTIAGO AINSA,
Notary Public, Pima County, A. T.

(Copy.)

20 Copy.

PLAINTIFF'S EXHIBIT "A."

Contract made on the 11th day of October, one thousand eight hundred and eighty-one, in the city of Tucson, Pima county, Territory of Arizona, between Manuel Sanchez and Washington M. Jacobs, residents of said city.

Manuel Sanchez, owner of mines, binds himself to give as property (to make over) to W. M. Jacobs, assayer, with good title deeds, the third part in some and the fourth part in others of all the mines which he may at this time possess, and also the same parts of those which he may possess in company with other persons and those which he may discover and possess in the future, either alone or in company with others.

All this Sanchez does in compensation for all the assays which Jacobs has been making without charge during eighteen months.

Washington M. Jacobs binds himself to make all assays which Sanchez may present to him of the mines of his property without making any other charge therefor than the above stipulated.

In good faith of the above stated both parties bind themselves to act in accordance with the laws of the country where the mines may

be discovered or those possessed may be, binding also their present and future possessions, and both signed this day.

(Signed) his MANUEL x SANCHEZ. mark.
WASHINGTON M. JACOBS.

Witnesses:
J. M. SYLVA,
H. N. SMITH.

(Copy.)

PLAINTIFF'S EXHIBIT "B."

This document is to show that I, Manuel Sanchez, for myself and my partners, give ample power to Don Washington M. Jacobs, whom I recognize as also one of my partners, to sell, to contract or bond, to whomever may interest themselves, for the following mines at the prices, to wit:

The "Lometa," the continuation, and the "Laguara" in the amount of	$1,500 00
La mine of gold "Canibabe"	2,500 00
The mine "Angelita"	3,000 00

Remembering that this mine has another vein or lead, and its shaft of 88 feet, according to the ordinance, but there is due $100 on it.

The "Santa Crista," two veins of gold, in the amount of	3,000 00
The "Estrella," with a hole of 3 feet	1,500 00
Sum total	$11,500 00

The quarter part of said sum belongs to Mr. W. M. Jacobs as owner of the fourth part, which he represents so as to enable Mr. Jacobs to contract and guarantee with legality, give this my signature obliging me to respect in this country or in Sonora religiously, and in proof whereof signed this in Tucson the 26th day of January, 1883, before whom below signed.

his MANUEL x SANCHEZ. mark.

Witnesses:
MARK TULLY AND
FRANK R. BETTIS.

(Copy of translation from the Spanish.)

Copy.

PLAINTIFF'S EXHIBIT "C."

It is hereby agreed by and between J. M. George, J. J. Hiertz, and J. S. Morgan, parties of the first part, and W. M. Jacobs, party of the second part, as follows, to wit:

The parties of the first part agree to proceed to Sonora and there examine the "Saint Richards Mine," and if found on examination to be satisfactory to pay for said property as provided for and specified in a certain contract of May 10th, 1883, made by the above-named parties and one Manuel Sanchez; and in case said property shall be purchased by the said J. M. George, J. J. Hiertz, and J. S. Morgan, they each of them mutually agree to deed to the said W. M. Jacobs, as commission for the sale and purchase of said mine, free of any and all expenses to him, one-quarter of said mine for him to have, hold, or transfer at option without cost or expenses of taxes or assessment work or other expense whatever.

The party of the second part agrees that for and in consideration of said one-quarter of said mine to give to the party of the first part the refusal and first option to purchase said one-quarter of said mine whenever the said party of the second part shall conclude to bargain for or sell his said quarter of said mine.

It is also and further agreed by each of the parties herein named that either the party of the first part or the party of the second part shall have the right to erect and establish such reduction works upon or near said mine as they may deem fit at their own expense, and develop said mine in such manner as in their judgment may seem to them best for their individual interest without interference or hindrance by the other party of the second part. It is further agreed that the party of the first part are to have and receive all the profits arising from the development of said mine, and the reduction of ores they may take from said property until the party of the second part shall have disposed of his said one-quarter of said mine.

Tucson, May 10th, 1883.

J. M. GEORGE,
J. J. HIERTZ,
J. S. MORGAN,
W. M. JACOBS.

PLAINTIFF'S EXHIBIT "D."

TUCSON, *May 10th*, 1883.

It is hereby agreed between Manuel Sanchez and W. M. Jacobs, of Tucson, A. T., party of the first party, and J. M. George, J. J. Hiertz, and J. S. Morgan, of the same place, party of the second part, witnesseth:

The party of the first part agrees to sell to the party of the second part all their right, title, and interest in and to the Saint Richard mine, formerly known as the Santo Christo mine, situated in the State of Sonora, Mexico, district of Ures.

Also to procure and deliver to the party of the second part a good and sufficient title for said property for the consideration and sum of five thousand dollars, currency of the United States, said sum of $5,000 to be paid in four installments, to wit, one thousand dollars on the delivery of satisfactory titles for the property, and one thousand dollars in sixty days from date of first payment, and one thou-

sand dollars in thirty days from date of second payment, and two thousand dollars at six months from date of first payment, which consummates the final and full payment of said property.

The party of the second part agrees to make said payments as above specified; also agree- to pay all expenses incurred in going to Sonora to examine the property and return to Tucson, whether the property shall be found satisfactory on examination or not.

Title papers shall be understood in this agreement and accepted by lawful denunciation under the mining laws of Sonora, Mexico.

(Signed) PEDRO P. BUSTAMENTE.
WASHINGTON M. JACOBS.
J. M. GEORGE.
J. J. HIERTZ.
J. S. MORGAN.

Firmo por MANUEL su x cruz. SANCHEZ por no saber firmar.

(Copy.)

21 *Minute Entry, Nov. 12th,* 1887.

Title of court and cause.

This cause having been heretofore tried by the court without a jury, a trial by jury having been expressly waived, and the court having heard the pleadings and proof, and Messrs. Haynes and Mitchell, attorneys for the plaintiff, and T. D. Satterwhite, attorney for the defendants, having also been heard, and the court having fully considered the said pleadings, proofs, and arguments, and being now fully advised in the premises, and it appearing to the court that W. M. Jacobs, the plaintiff herein under the agreement between him and the defendants, J. M. George, J. J. Hiertz, and J. S. Morgan, set forth in the third paragraph of the complaint and in the event that has happened, is entitled to have and receive from the said defendants a deed for one-fourth of one-fourth of the San Ricardo mine or Saint Richards mining location, in accordance with the usual forms of such conveyances in the State of Sonora, Mexico, and to hold or transfer the said sixteenth of said mine and mining location without cost or expense of taxes, assessment work, or other expense whatever: It is therefore ordered, considered, and adjudged by the court that judgment be entered herein for the plaintiff as to one-sixteenth of the premises and in accordance with the prayer of the complaint and the practice of this court, and the plaintiff have judgment for his costs herein.

The defendants thereupon filed a motion for a new trial herein, and the same having been heard and considered was by the court overruled, and defendants excepted and gave notice of appeal in open court.

Decree.

Title of court and cause.

This cause having been heretofore tried by the court without a

jury, a trial by jury having been expressly waived, and the court having heard the pleadings and proofs, and Messrs. Haynes & Mitchell, attorneys for plaintiff, and Messrs. King & Satterwhite, attorneys for the defendants, having been also heard, and the court having considered the said pleadings, proofs, and argument, and being fully advised in the premises, and it appearing to the court that Washington M. Jacobs, the plaintiff herein, under the agreement between him and the defendants, J. M. George, J. J. Hiertz, and J. S. Morgan, set forth in the third paragraph of the complaint, and in the event that has happened, is entitled to have and receive from the said defendants a deed for one-fourth of one-fourth of the said San Ricardo mine or Saint Richards mining location, in accordance with the usual form of such conveyances in the State of Sonora, Mexico, and to have, hold, or transfer the said one-sixteenth of said mine and mine location without cost or expense of taxes, assessment work, or other expense whatever, and judgment having been ordered herein for the plaintiff as to said one-sixteenth of said premises, in accordance with the prayer of the complaint and the practice of this court, and for costs:

22 It is therefore ordered, considered, and adjudged by the court that the defendants, J. M. George, J. J. Hiertz, and J. S. Morgan, upon demand of the plaintiff, execute and deliver to the plaintiff, Washington M. Jacobs, a conveyance in proper form to enable him to record the same in the State of Sonora, in the Republic of Mexico, of an undivided one-sixteenth of the San Ricardo mine in Ures district, in said State, being the same property as was included in a certain document thereof made by one Manual Sanchez and one Fernandez on or about May 15th–20th, 1883, of record at Ures, or of so much thereof as they still hold, and that the defendant, The San Ricardo Mining Company, shall execute and deliver, upon demand, to the said plaintiff a conveyance in like form for any portion of said undivided one-sixteenth of said premises which the said other defendants shall be unable to convey, and that upon the failure of the said defendants to make such conveyances on demand, as the case may be, that the clerk of this court, as the special commissioner of the court for the purpose of making such conveyances, shall make, execute, and deliver such conveyance or conveyances to said plaintiff in the names of the said defendants, as the case may be.

In open court, November 12, 1887.

WM. H. BARNES, *Judge, &c.*

Indorsed: Filed November 12, 1887. J. H. Martin, clerk.

Title of court and cause.

Now come the defendants in the above-entitled action and move the court to set aside the judgment in the cause heretofore rendered and grant a new trial of said cause, upon the ground that the evidence in said cause was not sufficient to justify the decision of the court, and that said decision is against law.

KING & SATTERWHITE,
Attorneys for Defendants.

23 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

WASHINGTON M. JACOBS, Plaintiff,
vs.
J. M. GEORGE, J. J. HIERTZ, J. S. MORGAN, and THE SAN RICARDO MINING COMPANY, a Corporation, Defendants.

TERRITORY OF ARIZONA, *County of Pima*, } ss:

Know all men by these presents that we, J. M. George, J. J. Hiertz, J. S. Morgan, and the San Ricardo Mining Company (a corporation), as principals, and B. M. Jacobs and Albert Steinfeld, as sureties, do hereby acknowledge ourselves bound to pay to Washington M. Jacobs the sum of one hundred dollars, conditioned as follows: That

Whereas the said Washington M. Jacobs, the plaintiff in the above-entitled suit, No. 1011 on the docket of the district court of Pima county, Arizona, did, on the 12th day of November, 1887, recover of the defendants in said action a judgment and decree of said court that they, the said defendants, execute and deliver to him, the said Washington M. Jacobs, a deed to an undivided one-sixteenth interest of, in, and to that certain mining claim situate, lying, and being in the district of Ures, State of Sonora, and known as the San Ricardo mining claim;

And whereas said defendants have appealed from said judgment to the supreme court of the Territory of Arizona, and the clerk of said district court having fixed the probable amount of the costs to said action in the appellate court and in the court below at the sum of one hundred dollars:

Now, therefore, if said defendants, appellants in said action, shall prosecute their appeal with effect and shall pay all the costs of the court below or which may occur in the Supreme Court, then this obligation shall become void; otherwise to remain in full force and effect.

24 Witness our hands and seals this 23rd day of December, 1887.

THE SAN RICARDO MINING COMPANY,
By L. W. TATUM, *General Manager*. [SEAL.]
B. M. JACOBS. [SEAL.]
ALBERT STINFELD. [SEAL.]

TERRITORY OF ARIZONA, *County of Pima*, } ss:

B. M. Jacobs and Albert Steinfelt, being each duly sworn, each for himself says that I am worth double the amount for which I, as surety to the foregoing bond, have signed over and above my just

debts and liabilities, exclusive of property exempt from execution, and am a resident and freeholder within the Territory of Arizona.

B. M. JACOBS.
ALBERT STEINFELD.

[SEAL.] Subscribed and sworn to before me this 31st day of December, 1887.

THOMAS D. SATTERWHITE,
Notary Public, Pima County.

Endorsed: Filed January 3, 1888. J. H. Martin, clerk.

25 *Assignment of Errors.*

I.

The court erred in entertaining jurisdiction of the subject-matter of this action and in rendering a decree for the conveyance of the real estate in controversy, for the reason that said real estate is located in a foreign government and the title thereto is subject only to the laws and courts of the government where it is located.

II.

The court erred in finding and holding that the pretended contract between the parties to this action—Plaintiff's Exhibit C—was valid for any purpose, for the reason that the same was never executed or delivered.

III.

The court erred in finding and holding that the said alleged contract—Plaintiff's Exhibit C—was valid or binding on the defendants, for the reason that at the time said alleged contract was made the plaintiff was the agent of Manuel Sanchez for the sale of said mine, and could not become the agent of the defendants for the purchase of the same while he held such fiduciary relation to said Sanchez.

IV.

The court erred in decreeing that the defendants execute a conveyance of one-sixteenth of the mining property in controversy to the plaintiff, for the reason that said alleged contract—Plaintiff's Exhibit C—does not fix any definite time for the execution of said conveyance, and for the further reason that it does extend the time for the execution of such conveyance until the plaintiff shall dispose of his alleged interest in said mine under said alleged contract, and that he has never disposed of the same.

V.

The court erred in decreeing to the plaintiff one-sixteenth of said mine, for the reason that at the date of the agreement between plaintiff and Manuel Sanchez—Plaintiff's Exhibit A, Trans., p. 97—the

title to said mine was vested in the State of Sonora, Mexico, and the said Sanchez had no title thereto; that the same was subsequently denounced by and in the name of Refugio Fernandez.

VI.

The court erred in finding and decreeing that the plaintiff was not the agent of Manuel Sanchez for the sale of said mine at the time the same was sold to the defendants, because the said finding is not supported by the evidence.

26 VII.

The court erred in finding and holding that the plaintiff was a part owner of said mine with the said Sanchez before the defendants purchased the same, for the reason that said mining property had not been denounced, and for the further reason that the contract between the plaintiff and said Sanchez was void for uncertainty in the description of the real estate.

VIII.

The court erred in decreeing one-sixteenth of said mine to the plaintiff, for the reason that if the plaintiff was the joint owner with said Sanchez in said mine, and if he, the plaintiff, was entitled to a conveyance of one-fourth of said mine from the defendants, then such interest would pass to Sanchez and Jacobs as joint owners of said mine, and Sanchez could sell the whole joint interest therein and the plaintiff would have to look to him for his *pro rata* share of such sale.

IX.

The court further erred in decreeing the one-sixteenth of said mine to plaintiff, for the reason that the plaintiff stood by and witnessed the sale of the whole of said mine by said Sanchez to the defendants without objection. Hence the plaintiff is bound and estopped thereby.

X.

The court erred in decreeing one-sixteenth of said mine to the plaintiff, for the further reason that the alleged contract set forth in plaintiff's complaint is under the laws of the Republic of Mexico and is void for error and was not executed or delivered in the manner required by the laws of said Republic.

THOS. D. SATTERWHITE AND
H. W. MAXWELL,
Attorneys for Defendants.

And afterwards, viz., on the 19th day of January, A. D. 1889, the said supreme court, after considering said cause, reversed the judgment of the district court; which said judgment is in words and figures following, to wit:

27 In the Supreme Court of the Territory of Arizona. January Term, 1889.

WASHINGTON M. JACOBS, Plaintiff and Appellee,
vs.
J. M. GEORGE *et al.*, Defendants and Appellants.

Appealed from Pima County.

This cause having been heretofore submitted to the court for consideration thereof, and the court being fully advised in the premises, it is by the court ordered, adjudged, and decreed that the judgment of the court below be, and the same is hereby, reversed and the complaint dismissed with costs.

Decision by James H. Wright, chief justice, Associate Justice Porter concurring, Associate Justice Barnes dissenting.

Judgment entered this 19th day of January, A. D. 1889.

Attest: WILLIAM WILKERSON, *Clerk.*

28 And afterwards, viz., on the 13th day of January, A. D. 1890, said day being the first day of the next regular term of said court, the said W. M. Jacobs filed his motion for an appeal to the same court of the United States; which said motion is in words and figures following, to wit:

Title of Court and Cause.

Now comes the above-named Washington M. Jacobs and prays an appeal to the Supreme Court of the United States on such terms as may seem just and proper to the court.

WM. H. BARNES AND
J. H. MARTIN,
Attorneys for W. M. Jacobs.

And with the same he filed a certain affidavit in words and figures following, viz:

Title of court and cause.

Washington M. Jacobs, the appellant, being duly sworn, on oath states that the matter in dispute in said cause is the one-fourth interest in the San Ricardo mine described in the pleadings; that he is informed and believes, and so states the fact to be, that the said mine exceeds the sum of one hundred thousand dollars in value.

He states that he is informed and believes that the net out-put of bullion from said mine is over seven thousand dollars per month; and further affiant sayeth not.

(Signed) WASHINGTON M. JACOBS.

Subscribed and sworn to before me this 10th day of January, A. D. 1890.

J. H. MARTIN,
[SEAL.] *Notary Public, Pima County, Arizona Territory.*

29 And the court, being fully advised in the premises, on, viz., the 14th day of January, A. D. 1890, caused the following order to be made and entered of record in said cause, to wit:

Title of court and cause.

In this cause it is ordered that an appeal to the Supreme Court of the United States be allowed upon plaintiff Jacobs entering into bond according to law in the penal sum of one thousand dollars; security, by consent, to be approved by the clerk of this court.

January 14th, 1890.

JAS. H. WRIGHT, *C. J.*
JOSEPH H. KIBBEY, *A. J.*
RICHARD E. SLOAN, *A. J.*

And, to wit, on said last day the court stated the findings of the court in said cause and ordered the same to be filed herein as follows, viz:

Title of court and cause.

The court, having considered this cause, states the following findings in this cause, to wit:

That one Manuel Sanchez, who was a mining prospector both in Arizona and Mexico, was in the habit during the years 1881 and 1882, and perhaps earlier than that, of taking samples of ore from mines which he had discovered to Washington M. Jacobs, the appellant, to make assays of them (Mr. Jacobs being an assayer in Tucson, Arizona).

Manuel Sanchez was a Mexican, unable to write his own name and with practically but little knowledge of the English language. That Sanchez reposed great confidence in Jacobs there is no doubt.

Hiertz, one of the appellees, testified that at the time nego-
30 tiations were pending for the property Jacobs said: "If you want that property you keep quiet, and I will procure the owner of the property. You must not interfere with us, as this man (meaning Sanchez) has confidence in me and I can deal better with him than you can."

On the 26th of January, 1883, Sanchez executed to Jacobs the following written appointment of agency or power of attorney to sell the mines of Sanchez:

"This document is to show that I, Manuel Sanchez, for myself and my partners, give ample power to Don Washington M. Jacobs, whom I recognize as one of my partners, to sell, contract, or bond to whomsoever may interest themselves for the mines at the prices, to wit (here follow names and prices), the quarter part of which mines belong to W. M. Jacobs, as the owner of one-fourth part of which he represents, so as to enable Mr. Jacobs to contract and guaranty with legality, give this my signature, obliging me to respect in this country or Sonora religiously, and in proof whereof signed this, in Tucson, the 26th day of January, 1883, before whom signed—

his
"MANUEL x SANCHEZ.
mark.

"Witnesses:
"MARK TULLY AND FRANK BETTIS."

The mine in question is called the "San Ricardo," and is situated in the Ures district, State of Sonora, Mexico.

Some months after the execution of the above power of attorney Mr. Jacobs returned from a trip to this mine with some of the ore therefrom, which sampled very rich. Morgan, one of the appellees, was at that time a mining agent in Tucson, and Jacobs exhibited to him the assays of this ore and gave him the use of his (Jacobs') assay office for Hiertz (another one of the appellees) to make assays of the ore also; he (Jacobs) to pay the expense of Hiertz's assays if it did not corroborate his. The assay of Hiertz was satisfactory, and on the 8th of May, 1883, Morgan, who seems to have been the moneyed man of the individual appellees, entered into the following agreement with Jacobs, viz:

31 "I will go and examine the mine in Sonora at our expense, and, if the mines suit us, will take a bond for six months on the property at $5,000, we to have all the ore we wish to take out of the mine, and have the privilege to do such work on the mines as we think proper, and either work the same by arrastras or otherwise during the time pending our bond, or if after examination of the mines we conclude to purchase, we will pay the owners $1,000 cash after examination if found satisfactory and $1,000 in sixty days and $1,000 in ninety days; balance, $2,000, at expiration of bond. A failure or non-compliance to above will forfeit right to claim and what is paid.

Tucson, May 8th, 1883.

J. S. MORGAN.

I agree to use my best endeavors to secure the property above described upon the terms specified.

W. M. JACOBS."

That a short time before this contract was executed Mr. Jacobs says Sanchez had told him he would take $5,000 for the mine.

Two days after this contract between Morgan and Jacobs was entered into a contract for the sale of said mine for the sum of $5,000 was entered into by and between the appellants, Jacobs and Manuel Sanchez, parties of the first part, and George Hiertz and Morgan, parties of the second part, the terms of the sale being identical with those contained in the contract between Jacobs and Morgan.

At the same time, but in the absence of Sanchez and without his knowledge or consent, Jacobs, the appellant, and the appellees, George, Hiertz, and Morgan entered into the following contract, viz:

"It is hereby agreed by and between J. M. George, J. J. Hiertz, and J. S. Morgan, parties of the first part, and W. M. Jacobs, party of the second part, as follows, to wit: The parties of the first part agree to proceed to Sonora and there examine the Saint Ricardo mine, and, if found on examination to be satisfactory, to pay for said property as provided for and specified in certain contract of May 10, 1883, made by the above-named parties and one Manuel Sanchez, and in case said property shall be purchased by said J. M.

George, J. J. Hiertz, and J. S. Morgan, they each of them mutually agree to deed to the said W. M. Jacobs, as commissions for the
32 sale and purchase of said mine, free from any and all expense to him, one-quarter of said mine, for him to have, hold, or transfer at option without expenses of taxes or assessment, work, or other expense whatever.

"The party of the second part agrees that for and in consideration of said one-quarter of said mine to give to the party of the first part the refusal and first option to purchase said one-quarter of said mine whenever the said party of the second part shall conclude to bargain for or sell his said quarter of said mine. It is also further agreed by each of the parties herein named that either the party of the first part or the party of the second part shall have the right to erect and establish such reduction works upon or near said mine as they see fit at their own expense, and develop said mine in such manner as in their judgment may seem to them best for their individual interests without interference or hinderance by the other party of the second part. It is further agreed that the party of the first part are to have and receive all profits arising from the development of said mine and the reduction of ores they may take from said property until the party of the second part shall have disposed of said one-quarter of said mine.

(Signed) J. M. GEORGE.
J. J. HIERTZ.
J. J. MORGAN.
W. M. JACOBS."

Jacobs had demanded this one-quarter of the mine at the time he first told the vendees he could probably get the mine for them for $5,000, it being in evidence that he told them also that the mine was worth $10,000.

He told them they should give it to him as commission, but not to let Sanchez know anything about it. Sanchez did not know anything about it until some time after the trade was made. Then he told the parties that Jacobs had acted false with him and kept an interest for himself, and he demanded that the appellees should pay him and not Jacobs for this one-fourth interest. After some time appellees paid Sanchez $1,250 for the one-quarter interest in the mine and took his deed therefor. Sanchez paid Jacobs one-fourth of the original purchase-money, the $5,000, as the installments were paid, and Jacobs executed to Sanchez the following receipt.

33 "TUCSON, *November* 24, 1883.

I received from Manual Sanchez the sum of one thousand two hundred and fifty dollars as part of the commission of five thousand which he received from J. M. George, J. J. Hiertz, and J. S. Morgan for the sale on the contract of the mine San Ricardo, situated in the district of Ures, in Sonora, Mexico.

(Signed) WASHINGTON M. JACOBS.

Witness:
SANTIAGO AINSA."

From these facts the court finds that Jacobs and Sanchez were partners in the ownership of the Ricardo mine.

That Jacobs was made Sanchez' agent to sell the mine.

That Sanchez and Jacobs agreed that the price to them should be $5,000.

That Jacobs contracted with George, Hiertz, and Morgan, appellees, that if the sale could be effected that appellees were to give him (Jacobs) one-fourth of the mine.

That the mine was bought by appellees.

That $5,000 was paid to Jacobs and Sanchez for the mine.

That appellees afterwards paid Sanchez $1,250 for one-half of one-fourth of the mine.

That appellees have not deeded to Jacobs one-fourth of the mine or any part of it.

The court finds that Jacobs acted in fraud of the rights of Sanchez, and hence that he cannot recover.

Done in open court this the 14th day of January, A. D. 1890.

JAMES H. WRIGHT,
Chief Justice Sup. Court.
RICHARD E. SLOAN,
Associate Justice.
JOSEPH H. KIBBEY,
Associate Justice.

And afterwards, viz., on the 24th day of January, A. D. 1890, the said Washington M. Jacobs filed his bond on appeal; which
34 said bond was on that day approved by the clerk of this court.

Which said bond, with the said approval endorsed thereon, is in words and figures following, to wit:

Title of court and cause.

Know all men by these presents that the undersigned, Washington M. Jacobs, William H. Barnes, and John H. Martin, are held and firmly bound unto J. M. George, J. J. Hiertz, and J. S. Morgan in the penal sum of one thousand dollars, lawful money of the United States, to be made out of our goods and chattels, lands and tenements.

Sealed with our seals this 20th day of January, A. D. one thousand eight hundred and ninety.

The condition of the above obligation is such that whereas the above obligator, Washington M. Jacobs, has prayed for and been granted an appeal to the Supreme Court of the United States in a cause wherein he is appellant and said J. M. George, J. J. Hiertz, and J. S. Morgan are appellees from the supreme court of the Territory of Arizona:

Now, in case the said Washington M. Jacobs shall pay or cause to be paid every and all judgments, decrees, costs, and charges that may be adjudged or decreed against him, then this obligation shall be void; otherwise of full force and effect.

In witness whereof we have hereunto signed our names and affixed our seals this 20th day of January, A. D. 1890.

WASHINGTON M. JACOBS. [SEAL.]
WILLIAM H. BARNES. [SEAL.]
JOHN H. MARTIN. [SEAL.]

Endorsed: Approved and filed January 24th, 1890. J. E. Walker, clerk.

35 SUPREME COURT, *Arizona Territory,* } ss:

I, J. E. Walker, clerk of the supreme court of the Territory of Arizona, do hereby certify that the foregoing transcript contains full, true, and correct copies of the amended complaint, answer of personal defendants, George, Hiertz, and Morgan; amended answer of George Hiertz and Morgan, answer of San Ricardo Mining Company, statement of facts, minute entry, Nov. 12, 1887; decree, motion for new trial, bond, assignment of errors, judgment of supreme court, petition for appeal, affidavit of value, allowance of appeal, findings of the court, bond on appeal in the case of Washington M. Jacobs *vs.* J. M. George *et al.*

Witness my hand and the seal of said court this 27th day of January, A. D. 1890.

[Seal United States Supreme Court, Arizona.]

J. E. WALKER, *Clerk.*

36 In the Supreme Court of the United States.

WASHINGTON M. JACOBS *vs.* J. M. GEORGE *et als.* } Appeal from the Supreme Court of the Territory of Arizona.

And now comes the appellant and assigns as manifest errors in the record in said cause as follows, to wit:

1st. The court erred in reversing said cause and dismissing the complaint.

2nd. The facts found do not sustain the judgment.

3rd. The court erred upon the facts found in not affirming the judgment.

4th. The court erred upon the facts found in not rendering judgment in favor of the plaintiff; that he is the owner of an undivided one-fourth of the San Ricardo mine, and for the remedy prayed for.

WM. H. BARNES,
Attorney for Appellant.

Endorsed on cover: Arizona Territory supreme court. No. 1590. Washington M. Jacobs, appellant, *vs.* J. M. George, J. J. Hiertz, and J. S. Morgan. Filed March 14th, 1890.

NOV 9 1892
JAMES H. McKENNEY,
CLERK.

150-415

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

WASHINGTON M. JACOBS,
Appellant;

vs.

J. M. GEORGE, J. J. HIERTZ, AND J. S. MORGAN,
Appellees.

Appeal from Supreme Court of Arizona.

W. H. BARNES,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

WASHINGTON M. JACOBS,
Appellant;

vs.

J. M. GEORGE, J. J. HIERTZ, AND J. S. MORGAN,
Appellees.

Appeal from Supreme Court of Arizona.

May it please the Court:

It appears that the appellant, Jacobs, and one Manuel Sanchez, were, in May, 1883, owners of a mine in Sonora, Mexico, known as "The San Ricardo," Sanchez $\frac{3}{4}$ and Jacobs $\frac{1}{4}$. That they had agreed between themselves that they would sell the same for $5000, and Jacobs was authorized by his partner, Sanchez, to negotiate a sale of the mine for that sum. Afterwards Jacobs did negotiate a sale of the mine to the appellees, J. M. George, J. J. Hiertz and J. S. Morgan. The contract of sale was this, that appellees were to pay Jacobs and Sanchez $5000 for the mine, and, in addition, the appellees were to convey back to Jacobs one-fourth of the mine. This was performed, the $5000 was paid; Jacobs and George received said sum, Sanchez $\frac{3}{4}$ and Jacobs $\frac{1}{4}$, and Sanchez was satisfied. Jacobs

then demanded of appellees that they convey to him the one-fourth of the mine as agreed upon. Defendants declined to do so. Afterwards defendants, without consulting Jacobs, paid Sanchez $1250, and the latter conveyed to them his interest in the mine. Jacobs brought this suit and prayed a specific performance of the contract, and prayed that defendants be required to convey to him $\frac{1}{4}$ of the mine. The trial Court held that defendants should perform their contract and must pay the price of $5000 and convey $\frac{1}{4}$ of the mine. That as Sanchez had been paid, there was due to Jacobs $\frac{1}{4}$ of $\frac{1}{4}$, or 1-16, and they were ordered to convey that interest to plaintiff. Defendants appealed to the Supreme Court of the Territory, and the judgment was reversed and the complaint ordered to be dismissed. From this judgment Jacobs appeals to this Court. It was urged in that Court that as it appeared that Jacobs had concealed from his partner, Sanchez, the fact that one-fourth of the mine was to be deeded to him in case of sale to defendants, that Jacobs was guilty of a fraud and could receive nothing. The answer to this is that defendants were not defrauded. They contracted to pay $5000 for the mine and to convey to Jacobs one-fourth of the mine as a consideration of negotiating the purchase. We concede that Jacobs would hold the one-fourth in trust for himself and his partner Sanchez, and in so doing Sanchez would not be defrauded. It was a question solely between Sanchez and Jacobs, and these defendants had nothing to do with it. Knowing of this, defendants paid Sanchez a consideration for his equity in this contract, which was $\frac{3}{4}$ of $\frac{1}{4}$, and they still owe

1-16 to Jacobs. It is against public policy for a man to act as a broker for both parties unless the fact is fully communicated to them. (Carmell vs. Smith, 142 Pa. St., 25). In this case the fact was fully communicated to these defendants, and they contracted with Jacobs with such full knowledge.

The above case is authority for Sanchez to recover of Jacobs his portion of the full amount of consideration received by Jacobs for the sale of the mine. That if Jacobs received deed for the $\frac{1}{4}$ interest, Sanchez should have received $\frac{3}{4}$ of the same. This principle, however, cannot be carried to the extent of relieving defendants from paying the price of the mine agreed to be paid by them. It may be Jacobs sues to the use of himself and partner Sanchez. At least Sanchez could enforce his rights against Jacobs when defendants perform by conveying according to contract.

We now come to consider the findings of the Supreme Court of Arizona, Tr. p. 29.

The Court finds:—

That Jacobs was Sanchez' agent to sell the mine.

That they agreed on $5000 as the price of the sale.

That Jacobs sold the mine to defendants and was to receive one-fourth of the mine for negotiating the sale at that price.

That the $5000 was paid to Sanchez and Jacobs.

That defendants afterwards paid Sanchez $1250 for one-half of one-fourth of the mine.

That defendants have not deeded Jacobs any part of the mine.

That Jacobs acted in fraud of the rights of Sanchez, and hence that he cannot recover.

From these findings defendants own still $\frac{1}{8}$ of the mine.

The Court concludes that because Jacobs acted in fraud of Sanchez, he cannot recover of defendants. This is a *non sequiter*. Had he acted in fraud of defendants he could not recover. Defendants should not be permitted to retain $\frac{1}{8}$ of the mine against both Sanchez and Jacobs against their contract. They are not guardians of the rights of Sanchez. They must perform their contract, and if Jacobs does not account to Sanchez, do equity as to him, Sanchez has ample remedy. The findings are inconsistent with the judgment. From these findings the judgment should have been affirmed, as only 1-16 of the mine was adjudged to Jacobs. This much he was entitled to. We therefore pray that the judgment of the Supreme Court of Arizona be reversed and that Court be directed to affirm the judgment of the District (the trial) Court.

W. H. BARNES,

Attorney for Appellant.